

DOCUMENT ISSUE

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[Waiver of Required Amount of Bid Guaranty]. D-188380. April 22, 1977. 4 pp.

Decision re: Larry Loffredo Construction Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Navy: Naval Facilities Engineering Command, Alexandria, VA.

Authority: A.S.P.R. 10-102.5(ii). 55 Comp. Gen. 352. F.P.R. 1-10.103-4(b).

Protester asserted that the low bidder, Robert G. Ripper, should not be considered for award, since the bid was accompanied by an insufficient bid guaranty. Where the amount of a certified check, in lieu of bid bond, was in excess of the difference between the low bid and the next low bid, failure to provide the required amount of bid guaranty was properly waived pursuant to Armed Service Procurement Regulations. (Author/SC)

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Louis Koslakovski
I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-186380

DATE: April 22, 1977

MATTER OF: Larry Loffredo Construction Company

DIGEST:

Where amount of certified check, in lieu of bid bond, was in excess of difference between low bid and next low bid, failure to provide required amount of bid guaranty was properly waived pursuant to ASPR § 10-102.5 (11).

Invitation for bids (IFB) No. H62472-77-B-0300 was issued by the Naval Facilities Engineering Command, Department of the Navy. At bid opening on February 10, 1977, Robert G. Ripper (Ripper) was the low bidder at \$81,343. Bids were required to be accompanied by a bid bond or certified check in the amount of 20 percent of the amount of the bid. The bid submitted by Ripper was accompanied by a certified check in the amount of \$5,000 rather than the \$16,268.60 required. However, the contracting officer accepted Ripper's bid inasmuch as the certified check submitted by Ripper exceeded the difference between Ripper's bid and the next low bid (\$82,000) of Larry Loffredo Construction Company (Loffredo). The protest of Loffredo to our Office followed.

Essentially, the protester asserts that Ripper's bid should not be considered for award since it was accompanied by an insufficient bid guaranty.

Section 10-102.5(11) of the Armed Services Procurement Regulation (ASPR) (1976 ed.) provides that:

"Noncompliance with Bid Guarantee Requirements.

Absent either (i) the existence of one of the following situations or (ii) a written determination by the contracting officer that, notwithstanding the existence of one of the following situations, acceptance of the bid would be detrimental to the Government's best interests, noncompliance with a solicitation requirement that the bid be supported by a bid guarantee will require rejection of the bid (See 2-404.2(h)):

* * * * *

"(11) when the amount of the bid guaranty submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid, * * *."

Since Ripper's failure to conform to the literal requirements of the bid bond provision comes within the ASPR exception, the agency properly waived the deficiency in Ripper's bid. See Commercial Sanitation Service, 55 Comp. Gen. 352 (1975), 75-2 CPD 212.

With regard to Loffredo's contention that there is nothing in ASPR which mandates that the contracting officer accept a bid guaranty less than that required in the IFB, we stated in Commercial Sanitation, supra:

"The cited provision of ASPR [§10-102.5(11) (1974 ed.)] was promulgated to provide exceptions to the general rule where deemed to be in the best interest of the Government. While the ASPR provision in question gives discretionary authority to the contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Since the low bidder's failure to conform to the literal requirements of the bid bond provisions comes within one of the ASPR exceptions, such failure should be waived provided it is found by the procuring activity not to have been due to the protester's inability to obtain the bid bond in the required amount for financial or related reasons, or for such other valid reasons that would not make acceptance of the bid in the best interests of the Government. Stated differently, absent a specific finding, which was not made here, that a waiver of the requirement was not in the best interests of the Government, the bid should not be rejected if it falls into the stated exception. To rule otherwise would permit unbridled discretion to totally defeat

the purpose of the exception and allow its employment as a substitute for rejecting bids for unrelated reasons such as nonresponsibility determinations."

In the present case, there was no finding that the acceptance of Ripper's bid would in any way be detrimental to the best interests of the Government or prejudice the rights the Government would otherwise have.

Additionally, in Commercial Sanitation, *supra*, we recommended to the ASPR Committee of the Department of Defense that the language of ASPR § 10-102.5 be revised so that it is no longer discretionary on the part of the contracting officer whether to accept a bid if the bid bond is deficient but falls within one of the enumerated exceptions. Similar provisions for the acceptance of bids under like circumstances are contained in the Federal Procurement Regulations § 1-10.103-4(b) (1964 ed. amend. 48) and make the application of the regulation mandatory.

The allegation that the waiver of a bid bond deficiency gives the bidder additional time to obtain performance and payment bonds is without merit. Under the terms of the solicitation, all bidders have the same time after bid opening within which to obtain such bonds. Therefore, we do not believe the waiver provisions of ASPR § 10-102.5(ii) discriminate between bidders in obtaining performance and payment bonds.

Finally, Loffredo argues that the Government is not protected by the amount of an insufficient bid guarantee even though the guarantee submitted covers the difference between that bid and the next low bid. In this connection, it is argued that once award is made to the bidder furnishing the insufficient bid bond all other bids are in effect rejected and the second low bid is no longer available for acceptance should the low bidder fail to execute the necessary documents and is therefore defaulted.

The sufficiency of a bid bond relates to whether the Government will receive the full and complete protection contemplated in the event the bidder fails to execute and deliver the required contract documents and the required performance and payment bonds. Assuming, *arguendo*, that in the event of default and nonavailability of the other bids, as contended by the protester, it is true that the Government will not have the secured protection contemplated. However,

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under the default clause of the contract the defaulted contractor will be liable for any excess costs upon reprocurement. Whether any reprocurement contract price will be in excess of the second low bid on the original solicitation is speculative. In any event, it has been decided as a matter of policy, as set forth in ASPR, that full and complete protection may be waived in the circumstances enumerated.

Accordingly, the protest is denied.

Deputy

R. H. Keller
Comptroller General
of the United States